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ABSTRACT

This paper examines the potential impacts of the comprehensive free-trade agreement negotiated by the United States and Canada in 1987 on transborder data flow between the two countries. An introductory overview of transborder data flow (TDFs) is followed by a discussion of how TDFs have been dealt with by both the United States and Canada to date; a brief history of the most recent free-trade negotiations between the two countries; and an analysis of the foundations of the agreement on two levels that relate directly to TDFs--its possible impact on trade in services and its potential impact on foreign direct investment in Canada. The paper concludes with speculations about the long-term effects of free trade in the areas of trade in services and foreign direct investment as they pertain to TDFs. (65 endnotes) (CGD)

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TDFs and Trade:
The U.S.-Canada Free-Trade Agreement From a Transborder Data Flow Perspective

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ABSTRACT

TDFs and Trade:
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On January 2, 1988, President Ronald Reagan and Canadian Prime Minister Brian Mulroney both signed a formal bilaterally negotiated proposal for a comprehensive free-trade agreement between the United States and Canada. This agreement, if ratified by U.S. Congress and Canadian Parliament, could represent the single most influential trade agreement ever reached between two industrialized nations.

Because of the scope of the agreement, it has stirred tremendous controversy since the initiative was made by Prime Minister Mulroney three years ago. Among the areas of trade most dramatically affected by the proposed agreement are agriculture, energy, automotive, intellectual property, investment and "services." One area that has received little attention in these multifarious debates, however, is that of transborder data flow.

This paper analyzes TDF as an issue of trade in services and foreign direct investment, and how these relate to the free-trade agreement. The paper begins with an overview of TDFs. Then, after a discussion of how TDFs have been dealt with by both countries to date, the author presents a brief history of the most recent free-trade negotiations between the U.S. and Canada. The author then analyzes the agreement in terms of trade in services and foreign direct investment. This is concluded with speculations about the long-term effects of free trade in the areas of trade in services and foreign direct investment as they pertain to transborder data flow.

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TDFs and Trade:
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On January 2, 1988, President Ronald Reagan and Canadian Prime Minister Brian Mulroney both signed a formal bilaterally negotiated proposal for a comprehensive free-trade agreement between the United States and Canada. This agreement, if ratified by U.S. Congress and Canadian Parliament, could represent the single most influential trade agreement ever reached between two industrialized nations. Even today, the volume of trade between the United States and Canada is greater than anywhere else on earth. And, vitalized by the systematic removal of tariff and non-tariff trade barriers over the next ten years, the $150 billion worth of annual trade between these two nations will no doubt increase.

The most recent round of free-trade negotiations, initiated by Prime Minister Mulroney in 1985, has stimulated heated debate among many Canadians and some U.S. interests. Among the areas of trade most dramatically affected by the proposed agreement are agriculture, energy, automotive, intellectual property, investment and "services."[1] Most of these trade areas have a long history of tariff and non-tariff protection, thus debate on these issues has increased because of their relation to the proposed free-trade agreement.

One area that has received little attention in these multifarious debates, however, is that of transborder data flow. Because any discussion of transborder data flow (TDF) necessarily revolves around discussions of trade in services and foreign direct investment, the new free-trade agreement portends dramatic impact on TDFs between Canada and the U.S. And, in some respects, the free-trade agreement, if it is a signal of things to come, sets the stage for many other trade arrangements similar in scope and in impact.[2]

This paper represents an attempt to examine the potential impacts of the free-trade agreement on TDFs between the United States and Canada. This paper will begin with an overview of transborder data flow. Then, after a discussion of how TDFs have been dealt with by both countries,

the author will present a brief history of the most recent free-trade negotiations between the United States and Canada. The author will then analyze the foundations of the Free-Trade Agreement on two levels that relate directly to transborder data flow: its possible impact on trade in services and its potential impact on foreign direct investment in Canada. This will be followed by speculations about the long-term effects of free trade in the areas of trade in services and foreign direct investment as they pertain to transborder data flow.

Transborder Data Flow

Transborder data flow was "born" with the marriage of telecommunications technologies and data processing, areas still dominated worldwide by U.S. corporations. This dominance and the obvious impacts of technology on the world economy have sparked intense debate over transborder data flow in recent years. Of particular concern to most countries is the fact that the corporate sector of the United States, with companies such as IBM, American Express and COMSAT, maintains a firm grip on the development and operations of data processing hardware and networks, and, thus maintains an influential position in the social and economic development of much of the world.

Both developed and developing countries are attempting to build national telecommunications and data-processing industries and to expand their share of world information markets, Canada included.[3] However, U.S. domination of the movements of machine-readable data across national boundaries for processing, storage and retrieval (TDFs) has prompted protest from both developed and developing nations.[4] By 1981, the United States was responsible for 80 percent of worldwide transmission and processing of data.[5]

Most of the concern over TDFs revolves around the fact that technological changes have made information a vital resource and factor of production; a new macroeconomic concept of information has arisen. According to J.F. Rada of the International Management Institute in Geneva, evidence shows that the shift of the labor force toward information processing and services is more related to

changes in the way industry operates rather than a simple addition of new services.[6] The basis of this change revolves around the fact that information and information services are now being handled as a commodities. To officially underscore this point, the United States Trade and Tariff Act of 1984 actually elevates trade in services to a position equal to that of trade in goods.[7]

This new approach to information is particularly important when one considers that the so-called service sector has become one of the largest and fastest growing parts of economies in developed countries. According to a 1983 U.S. House of Representatives report, services represented 67 percent of economic output and 72 percent of employment in the United States, and more than half of the gross domestic product in most developed countries. Internationally, 1982 U.S. service sector exports totalled $135 billion, a 52 percent increase over 1980. France, Great Britain and Japan have also experienced substantial increases in service sector exports.[8]

Consequently, there has been dramatic growth in information-based industries such as banks, the travel industry, insurance companies, and other such businesses that could not operate without the ability to move and use information.[9] Telerate, a New York company that provides financial information to many commercial institutions, increased revenues elevenfold between 1978 and 1983 and is continuing to expand at a startling rate. In Europe the total revenue from on-line database services alone will have increased from $300 million in 1982 to $896 million in 1987.[10]

The connection between the free-trade agreement and transborder data flow at first appears sketchy. However, under closer scrutiny of the agreement itself, TDF arises as an issue of trade in services and foreign direct investment, both of which are directly and dramatically affected by the recent proposed agreement between Canada and the United States.

Transborder Data Flow, Trade in Services and Foreign Direct Investment

In terms of trade, TDF falls under the category of trade in services; this much is apparent. However, a bit less obvious is the connection between TDF and foreign direct investment. Foreign direct investment is not simply a matter of trade. Trade in services involves just that, international trade. However, foreign direct investment involves much more sensitive issues, such as ownership, the

question of control over the domestic economy and, ultimately, considerations of national sovereignty.[11] Transborder data flow is of particular concern here because as much as 90 percent of all TDF is intracorporate, thus underscoring the relation between foreign direct investment and transborder data flow.[12]

Karl P. Sauvant of the United Nations Centre on Transnational Corporations defines foreign direct investment as "investment that is made to acquire the lasting interest in an enterprise operating in an economy other than that of the investor, the investor's purpose being to have an effective voice in the management of the enterprise."[13] Normally, Sauvant says, such investments are undertaken by corporations - which, in this manner, become transnational corporations- through the establishment of foreign affiliates. This is particularly the case in such service activities as banking, insurance and hotel services, but it also applies to air transport, newspaper agencies, and engineering and software consultancy which, while tradeable, often require facilities abroad in order to provide maintenance and similar support services.[14]

Thus, the boundaries between foreign direct investment and trade are blurring in certain services, and clearer definition between the two is not likely, given the growing complexity and rising data-technology content of modern products and production and the services associated with them.[15] The 1984 U.S. Trade and Tariff Act exemplifies the dual approach to services and foreign direct investment. Not only does the Act elevate trade in services to a position equal to that of trade in goods, but it also includes foreign direct investment under the trade regime, and, therefore, explicitly defines barriers to trade as including restrictions on establishment of operations in foreign markets.[16]

In terms of the Canada-U.S. Free-Trade Agreement, trade in services and foreign direct investment have been major issues of the negotiations.[17] But before analyzing the trade in services and foreign direct investment issues as they pertain to the free-trade agreement, it is important to understand the history and framework of the free-trade agreement.

An Overview of the Canadian Free-Trade Initiative

Trade between Canada and the United States is greater in volume than trade between any two other nations in the world. Annual trade figures for 1986 were about $150 billion, with almost 80 percent of Canadian exports going to the United States.[18] Ironically, because of a history of extensive tariff and non-tariff trade barriers, Canada has become known as the most protected economy in the developed West. However, with the recent submission to Congress by President Reagan of a free-trade agreement between the U.S. and Canada, it appears that the days of protectionism and trade wars in North American could soon be over.

The possible impact of a free-trade agreement between these two nations has been the subject of heated debate in Canada for several years. Many Canadians fear that their country will become the "51st state" of the U.S., while others predict economic doom if Canada is not soon allowed free and open access to the massive American markets.[19]

In August 1983, the Canadian government, under Prime Minister Pierre Trudeau, released an official discussion paper entitled "Canadian Trade Policy for the 1980s." This report addressed Canada's overall trading performance, philosophy, and status in multilateral and bilateral trade issues. The report concluded by strongly supporting bilateral discussions with the United States as an option for enhancing trade relations and performance.[20] The report specifically addressed the notion of a sectoral free-trade agreement with the United States, in which certain areas of trade would be singled out for the elimination of all tariff barriers. It was argued that this approach would stimulate both economies, create jobs, and benefit the consumer populations and manufacturing sectors.[21]

The United States reacted positively to the unexpected Canadian initiative. However, by the end of 1984 many formidable obstacles still remained before the negotiation for a sectoral free-trade agreement could begin. Among these obstacles were the difficulty of obtaining GATT (the multilateral system addressing General Agreement on Tariffs and Trade) approval for sector-specific free-trade agreements, the different degree of government involvement in the Canadian and U.S. economic systems, and the transitional political phase of Canada because of the 1984 election of Prime Minister

Brian Mulroney.[22] Consequently, at the end of 1984 the initiative was neither openly embraced nor emphatically opposed.

With 1985 came several major events that prompted the formalization of the initiative. First, in January, the U.S. Government opened hearings on proposals to expand trade with Canada in ten specific areas: furniture, wood and wood products, paper and paper products, cosmetics and perfumery, petrochemicals, alcoholic beverages, steel and steel products, pesticides, agricultural machinery and informatics.[23] Because the inclusion of specific industries required extensive effort and time in negotiation, the limitations of the sectoral approach soon became evident. The comprehensive approach, in which industries would be specifically excluded rather than specifically included, replaced the sectoral approach.

In March of 1985, President Reagan and Prime Minister Mulroney officially met in Quebec City for the first face-to-face discussion of trade liberalization. From this meeting, a joint declaration was issued that clearly reflected the strong political commitment of both leaders to create a more stable, predictable trade environment.[24]

In early September of 1985, the Royal Commission on the Economic Union and Development Prospects For Canada issued the results of a 3-year study that strongly advocated a further liberalization of trade by Canada. The commission stressed that this liberalization should take place in accordance with GATT definitions of free-trade areas, and, in the interest of expediency, it should be pursued through bilateral negotiations with the United States.[25] The commission cited fear of protectionist tendencies in the U.S., and the desire to be competitive with U.S. firms in U.S. markets as the principal reasons behind its recommendations.

Just two weeks after the release of the commission's report, Prime Minister Mulroney announced his invitation to the United States to begin negotiations for the "broadest possible package of mutually beneficial reductions in tariff and non-tariff barriers."[26] On December 10, President Reagan notified Congress of his intent to negotiate a bilateral free-trade agreement with Canada. Actual talks were scheduled to begin in the Spring of 1986, and both sides seemed amenable to the

underpinnings of a comprehensive free-trade arrangement. President Reagan went so far as to single out free-trade talks with Canada in his State of the Union address in January 1986.[27]

Reagan, also in the spirit of expediency, asked Congress for so-called "fast track authority," which would allow him and a U.S. trade representative to negotiate the free-trade agreement and then present it to Congress as a package, thus belaying the Congressional inclination to amend and delay agreements according to special interests.[28] His request for this authority was barely approved by a 10-10 vote of the bipartisan Senate Finance Committee (disapproval does not carry in a tie vote). Despite Reagan's popularity, bipartisan opposition to the free-trade pact was, and continues to be, surprisingly strong.[29]

The first round of talks concluded on May 23, 1986. Both administrations went on record saying that they would benefit from a free-trade agreement. A confidential report commissioned by the Canadian government and released in mid May claimed that the removal of trade barriers could cost Canadians 131,000 jobs initially because of protection against imports. However, the report concluded saying the Canadian economy would benefit in the long run from expanded markets in the United States.[30]

The next 17 months were filled with controversy and frustration emanating from limited trade wars between the U.S. and Canada. Reagan and the U.S. Trade Representative, Clayton Yeutter, were operating under an October 1987 deadline, before which they would have to submit a finalized trade proposal to Congressional committees.

By April of 1987, both countries were coming up against the essential stumbling blocks of the negotiations. The United States demanded concessions concerning the elaborate protections covering Canadian "cultural" industries, including publishing and broadcasting.[31] The U.S. also warned Canada about extensive government subsidies in certain industries. To return the volley, Canada repeatedly blasted the U.S. for imposing tariffs on various exports, including steel, fish, softwood lumber and potash. And substantial opposition to the agreement had solidified in the Canadian ranks from opposing political parties, organized labor and other groups concerned about Canadian economic independence.[32]

July and August were months of continued debate in which negotiators were still far apart on major issues. As the October 4 deadline neared, tensions culminated in a September 23 Canadian walkout prompted by U.S. refusal to establish a separate bilateral trade monitoring committee to settle the trade disputes bound to arise from such a controversial comprehensive free-trade agreement.[33]

On October 3, the eleventh hour of the negotiations, the United States offered to bow to Canadian demands for the creation of a bilateral arbitration committee to oversee trade disputes between the two countries. This concession brought Canada back to the table and paved the way for the historic near-midnight, October 4 agreement.[34]

The agreement itself is laid out in eight sections, plus a preamble:

- The Preamble records the political commitment of the two governments in entering into the agreement, and also includes a statement of Canada's commitment to the multilateral trading system;
- Part One establishes the objectives and scope of the agreement;[35]
- Part Two sets out the rules for trade in goods;
- Part Three deals with government procurement;
- Part Four contains the three ground-breaking chapters on services, business travel and investment;
- Part Five contains the provisions dealing with financial services;
- Part Six contains the general dispute settlement provisions and the special arrangements for dealing with antidumping and countervailing duty procedures;
- Part Seven collects in one chapter the provisions dealing with non-categorical issues, such as balance of payments, national security, intellectual property, cultural industries, monopolies, and others.[36]

A tentative timetable for enactment of the agreement is:

- Winter 1988: Public hearings by Congressional Committees.
- March 9, 1988: Last day for U.S. industries to launch trade cases against Canada and avoid the dispute settlement tribunal.
- June 1, 1988: Implementing legislation to be sent to Capitol Hill. Congress will then have 90 sitting days to vote for or against free trade.
- Fall 1988: Congress and Parliament vote on the Agreement
- January 1, 1989: If ratified, the Free-Trade Agreement enters into force.
- January 1, 1999: Last tariff reductions take place, eliminating all customs duties on U.S.-Canada trade.[37]

It is now important to examine the extent to which Canada has attempted to regulate TDFs and how these regulations could be affected by the new agreement.

Canada, TDFs, and the New Agreement

> Information is power and economic information is economic power. Information has an economic value, and the ability to store and process certain types of data may well give one country political and technological advantage over other countries. This, in turn, leads to a loss of national sovereignty through supranational data flows.[38]
>
> (Louis Joinet, Secretary-General of the Commission on Data Processing and Liberties, September 1977)

In Canada, government leaders have been extremely concerned about the vast quantity of data being exported for processing, 90 percent of which are transferred for storage and processing to headquarters in other countries.[39] The Canadian government obviously has feared the consequences that TDFs might have upon the Canadian economy and Canadian society in general. The former Canadian Minister of Science and Technology, Hugh Faulkner, prompted a heated debate by claiming that TDFs were likely to render Canada overdependent on other countries through "loss of employment opportunities, balance of payment problems . . ., the danger of loss of legitimate access to vital information and the danger that industrial and social development will be largely governed by the decisions of interest groups residing in another country."[40]

In 1979, the Canadian government commissioned a special group of communications experts to study the impact of TDFs on Canada. Canada was bound to be increasingly reliant on foreign, primarily U.S., computing services. When 400 Canadian subsidiaries of U.S. companies were approached, it was found that in 1978 some $300-350 million worth of computing services were imported from U.S. company headquarters, with an increase to about $1.5 billion estimated for 1985. Further, the report claimed, about 23,000 jobs in computer services will have been lost to foreign data processing services.[41] The Committee concluded that unless the Canadian government acted quickly, Canada would become part of the exploited nations and peoples of the information age. Consequently the committee produced a "teleinformatic plan" for Canada in 1979 that included many measures to protect Canadian interests and information industries."[42]

Some of the regulations and policies that have resulted from these studies are:

-access to Information and Privacy Act (1982) which revises earlier privacy laws and is limited to federal public sector;

-privacy and credit reporting adopted by several provinces;

-Interministerial Task Force on TDF; research and policy suggestions for Cabinet on economic and sovereignty impacts;

-Canadian Bank Act and other federal and provincial laws that restrict or place conditions on corporate data exports;

-government, academic and business research on technological trends, information industries, sovereignty and cultural aspects of TDF.[43]

The Free-Trade agreement directly addresses TDF in Chapter C, paragraph 3 of Annex 1404: "This Chapter shall apply to all measures covered by this Sectoral Annex, which includes measures related to . . . the movement of information across the borders and access to data bases or related information stored, process or otherwise held within the territory of a Party."[44]

Despite the regulations listed above, privacy issues and credit reporting are not included in the Free-Trade Agreement. Federal and provincial laws pertaining to data exports are not likely to be changed by the Agreement either. Annex 1404, Part C, Article 6, Paragraph One of the Free-Trade Agreement states:

> Nothing in this agreement shall be construed to . . . prevent a Party from maintaining or introducing measures requiring basic telecommunications transport service traffic to be carried on basic telecommunications transport networks within its territory, where such traffic originates and terminates within its territory, originates within its territory and is destined for the territory of the other Party or a third country, or terminates in its territory, having originated in the territory of the other Party or a third country.

The same Annex of the Agreement does, however, spell out explicit opposition to the impairment of existing services.[45]

"Cultural industries" are specifically exempted from the provisions of the Free-Trade Agreement, except where they pertain to tariff elimination (Article 401), divestiture of an indirect acquisition (Paragraph 4 of Article 1607), retransmission rights (Article 2006) and the "Print-in-Canada Requirement" (Article 2007), which outlines tax deductions for advertisers.[46]

In general, the concern prompted by TDFs in developed countries emanates from discussions of balance of trade and levels of employment. According to Canadian Peter Robinson, Canada is one of the countries that feels it has most at stake in the economic debate over TDF. While some governments attempt to control transborder data flow through non-tariff barriers, such as regulations requiring registration of databases (Sweden), processing of data within the host country (West Germany, Canada, Brazil), purchase of domestic computer and communications equipment (Brazil), and limiting the use of private lines (Japan), regulation of TDFs is no easy task.[47] Jacques Nusbaumer, Director of the Technical and Other Barriers to Trade Division GATT Secretariat, summarizes the dilemma faced by any government attempting to develop TDF regulations:

> In today's interdependent world, government regulations face the particularly difficult task of striking a balance between access to technology and preservation of national cultural heritage. Expressed in data processing technology, this means striking a balance between access to data processing software and control over the collection and the use of raw data.[48]

This dilemma is particularly relevant to Canada now that a free-trade agreement appears to be imminent. There are two aspects of the trade agreement that will have significant impact on Canada's future data processing policies. Specifically, the liberalizations aimed at trade in services, and the relaxing Canadian government stance on foreign direct investment.

The Free-Trade Agreement, Trade in Services and Foreign Direct Investment

Because of its importance to the Canadian economy, trade in services has been a major trade issue in recent years. For Canada, of the 2.7 million new jobs created in the 1970s, some 2.2 million were in services. Though statistics concerning trade in services are sketchy, the numbers available point to almost total domination by the United States. In 1984 the Canadian market for telecommunications and computer services was worth about 13 billion in Canadian dollars. The U.S. total in 1984 was about 300 billion U.S. dollars.[49] In 1970, Canada imported in services a total of 2.9 billion Canadian dollars. That figure jumped 300 percent to $9.3 billion by 1980 (approximately the same level the U.S. was at in 1970).[50]

As early in the free-trade negotiations as 1985, intentions were voiced to halt protectionism in cross-border trade in goods and services. These include the "elimination or reduction of tariff and non-tariff barriers to trade in high-technology goods, and related services, such as computers, data flow and computer-assisted design and manufacturing technology."[51]

Specifically, the free-trade agreement, according to C. Michael Aho, senior fellow at the Council of Foreign Relations in New York, provides the opportunity to conclude pioneering agreements covering services, investment practices and intellectual property - what he calls "the festering trade problems of the day."[52] Trade in communications services has also been addressed by Flora Lewis, a Canadian economist:

> At a time when the clamor for protectionism is rising almost everywhere it could provide a vital push in the opposite direction. This would be particularly true in setting the precedent for including services, something the U.S. has been seeking from the GATT for a long time with no success so far. Third World countries, with India and Brazil in the lead, do not want to open competition in financial, communications and other services as they do with certain manufacturing industries because the advanced countries do have an edge. But this is a stand that can't be held indefinitely without harming all trade.[53]

The agreement has been designed to specifically remove restrictions on the operations of U.S. banks in Canada and lift the limits on U.S. ownership of Canadian financial institutions.[54] More generally, there will be less screening of American investment in Canada and a four-step raising of the ceiling on takeovers scrutinized by Ottawa from its current $5 million level to $150 by 1992.[55]

As Karl P. Sauvant explains, if the aim is to reduce obstacles to trade in services, then among the restrictions to be dismantled are restrictions on the right of corporate establishment (or on the right of presence).[56] This type of corporate freedom is just what U.S. negotiators have been striving for.[57] From the U.S. side of the table, both foreign direct investment and trade in services have been primary issues in the debate. Late in the negotiations, Senate Finance Committee Democrats and Republicans alike were demanding that the agreement include reductions of Canadian federal and provincial non-tariff barriers and liberalized foreign investment and trade in services.[58] It appears that the U.S. government might view trade liberalization in the services sector as a major step toward reducing the massive U.S. trade deficit.[59]

The Road to a Final Agreement

Given the economic problems signalled by the record U.S. trade deficit, the autumn stock market crisis and the always present temptation of protectionism, the fate of the agreement is still uncertain; it must still survive political battles in both countries. A telling sign of the lack of agreement in Canada is the call by some members of the opposition to submit the free-trade deal to general election.

Regardless of the outcome, the negotiations underscore the fact that technology industries and trade in services represent the major areas of economic expansion in the world trade market. If the Canada-U.S. Free-Trade Agreement is any indication of things to come, there will no doubt be a dramatic increase in the influence of American transnational corporations worldwide.

The free-trade agreement represents the first time that services and investment barriers have been targeted for elimination in an international trade negotiation. Even though the majority parties of both countries seem satisfied with the agreement, many Canadian companies - especially those in financial services, insurance, telecommunications and other sectors where the U.S. has an advantage - will face much stiffer competition in the near and far future.[60]

But, one cannot deny that Canada's initiative in the negotiations indicates not only its awareness of economic vulnerability, but also a certain degree of economic confidence. At present, Canada is the only major industrial country unable to offer its industries free and secure access to a market of at least 100 million people.[61] If greater access to U.S. markets does indeed boost Canadian exports, one can only imagine Canadian confidence growing, and opposition to free trade diminishing.[62]

Whether or not Canada's bold approach to trade with the U.S. continues, for many years the point has been made that the most potent threat to Canada's political and social strength would come from "a continued weakening of its industrial performance and a decline of its economic stability in the face of the challenge of the 1980s and 90s."[63] Thus, opposition to free trade that is based on industrial

dependency or cultural sovereignty concerns stands on shaky ground in light of the economic imperatives of an increasingly interdependent world economy.

In the long run, it seems that free-trade initiatives must be incorporated into the agenda of the GATT if smaller countries such as Canada are going to be able to sustain economic growth in the face of increasing market competition and increasing protectionist pressures from the massive industrial powers. The power of the GATT and the weakness of the Canadian position is clearly set out in the trade in services and TDF debate. Through the Canada-U.S. trade agreement, the U.S. will dramatically increase its access to Canadian industry in terms of TDF and other services, something the U.S. has been seeking from GATT for a long time with no success so far.[64]

As Canadian GATT expert Frank Stone points out, one principal function of the GATT rules, from a Canadian perspective, is to restrain and discipline the trade policies and practices of the United States and the other larger countries that are its main trading partners. These restraints and disciplines can be exerted more effectively within a multilateral system of rules, where alignments with other countries can usually be found, than within bilateral relationships where Canada would almost always be a junior partner with correspondingly smaller bargaining leverage.[65]

Debates about trading practices aside, the Canada-U.S. Free-Trade Agreement, if implemented, promises to be the source of much debate in the years to come. In terms of growth industries such as data processing and computer services, the U.S. stands to gain a great deal with the liberalization of trade in services and investment policies. Given Canada's disadvantage of size and technology, effective barriers to U.S. corporate invasion are not likely, especially in light of the new Agreement.

ENDNOTES

1. Summary of Free-trade agreement issued by the office of the United States Trade Representative, New York Times, October 5, 1987, IV, 1:3.

2. Since 1985 the United States has been operating under a similar trade liberalization agreement with Israel. Three other relevant agreements are the 1960 European Free-Trade Area; the 1965 UK-Ireland Free-Trade Agreement; and the 1983 Australia-New Zealand Closer Economic Relations Agreement. It is highly possible that with the adverse affects of the record U.S. trade deficit, the U.S. will seek more favorable trade environments in the near future.

3. Joan Edelman Spero "Information Policy Void" Foreign Policy 48 (Fall 1982):139.

4. See Laurie J. Wilson and Ibrahim Al-Muhanna "The Political Economy of Transborder Data Flows" Journal of Peace Research, 22(4):289, 1985, and also Anne Marie Goetz "Information Capacity and Power in North-South Relations: Transborder Data Flow and the Case of Brazil" Millennium: Journal of International Studies 15(1):48, 1986.

5. Hamid Mowlana, Global Information and World Communication: New Frontiers in International Relations (New York: Longman, 1986), p. 94.

6. Juan F. Rada "Trends and Effects of Information Technology" in Communication Regulation and International Business, J.F. Rada and G.R. Pipe Eds. (Amsterdam: North-Holland, 1984), p. 12.

7. Karl P. Sauvant International Transactions in Services: The Politics of Transborder Data Flows (Boulder: Westview Press, 1986), p. 39.

8. Wilson and Al-Muhanna "The Political Economy of Transborder Data Flows," p. 295.

9. Spero, "The Foreign Policy Void," p. 141. Spero says "International banking could not exist today without electronic funds transfer systems to execute money transfers, letters of credit, and foreign exchange and money market transactions."

10. Mowlana, Global Information and World Communication, p.94.

11. Sauvant, International Transactions in Services, p. 39. The controversy over ownership and national sovereignty is one of the major arguments put forth by the Canadian opposition to the free-trade agreement.

12. Meheroo Jussawalla "Constraints on Economic Analysis of Transborder Data Flows" Media, Culture and Society (July 1985):300.

13. Sauvant, International Transactions in Services, p. 24.

14. Ibid., p. 24.

15. Ibid., p. 36.

16. Ibid., p. 39.

17. See note #34 for a synapsis of the agreement.

18. New York Times, June 17, 1986, IV, 9:1.

19. John Turner, leader of the Canadian Liberal Party, is one of the most outspoken opponents of the Agreement. A December 19, 1987, article in the Globe and Mail quotes Turner: "This is not a free-trade deal, it is not even a trade deal. It is the Sale of Canada Pact." The Canadian public appears to be divided on the free-trade issue. A December 1987 poll conducted by Globe-Environics claims 40 percent of Canadians favor the agreement, while 39 percent are opposed and 21 percent are undecided. (Globe and Mail, December 30, 1987)

To underscore its opposition to the agreement, the Ontario Legislature, with its Liberal majority, passed a resolution on January 6, 1988, denouncing the Agreement. The resolution, which passed 79-26, said the Agreement signed by Prime Minister Mulroney and President Reagan failed to address Canada's "needs and goals" while making "significant concessions which could prove costly to Canada." (Montreal Gazette, January 7, 1988)

20. See the United States International Trade Commission's report on the Operation of the Trade Agreements Program, 36th Report, 1984 (1985):124.

21. Ibid., p. 124.

22. United States International Trade Commission's report on the Operation of the Trade Agreements Program, 37th Report, 1985 (1986):29.

23. Ibid., p. 30. Note the inclusion of "informatics" along with standard "goods."

24. Ibid., p. 32. For the complete text of the trade declaration, see appendix J of the Annual Report of the President of the United States on the Trade Agreements Program 1984-85 (Feb. 1986):143-4.

25. Ibid., p. 32.

26. Ibid., p. 34.

27. New York Times, March 16, 1987, I, 1:6.

28. New York Times, April 12, 1986, I, 33:3.

29. New York Times, April 24, 1986, IV, 1:3.

30. New York Times, May 23, 1986, IV, 4:4.

31. New York Times, April 6, 1987, IV, 1:6.

32. New York Times, April 3, 1987, IV, 1:6.

33. New York Times, September 30, 1987, IV, 1:2.

34. Following are excerpts from the Canada-U.S. Trade Accord issued by the office of the United States Trade Representative and printed in both the New York Times and the Financial Post (Canada) the day after the agreement was reached.

Agriculture: The two sides have agreed to a comprehensive package that will eliminate all agricultural tariffs within 10 years. The agreement provides more access to the Canadian market for

U.S. horticultural products; conditionally eliminates the Canadian import licenses for U.S. wheat, barley, oats and grain products, and liberalizes the Canadian import quotas for poultry, poultry products and eggs. Also, the agreement removes the Canadian transportation subsidies that are paid under the Western Grain Transportation Act for products moving through western Canadian ports to U.S. markets. The two countries will exempt each other from their respective meat import laws.

Alcoholic Beverages: Canada's discriminatory pricing system will be phased out. U.S. producers will also gain increased access to the distribution and marketing networks.

Energy: Both sides have agreed to prohibit restrictions on imports or exports, including quantitative restrictions, taxes, minimum import or export price requirements or any other equivalent measure, subject to very limited exceptions. With respect to existing measures, Canada has agreed to eliminate several practices which discriminate against energy exports to the U.S., and the U.S. has agreed to eliminate various import restrictions and to allow Canada access to oil from Alaska's North Slope, subject to certain conditions.

Automotive Industry: To enhance and strengthen the competitiveness of the North American automobile industry - representing about one-third and $46 billion of our bilateral trade - the agreement provides for: 1) The immediate elimination of Canada's export-based duty remission program (tariff subsidies linked to export performance and/or local production) and the phased elimination of local production-based schemes, all of which distort trade and investment patterns; 2) The elimination of all tariffs over 5 to 10 years; 3) The elimination of the Canadian embargo on used cars; 4) A new 80 percent North American (U.S. and Canada) rule of origin based on direct cost of manufacturing, to stimulate increased use of U.S. and Canadian automotive parts and materials; 5) The retention of Auto Pact benefits for current participants only (mainly Chrysler, Ford and General Motors,) to insure that no new firms may receive pact or pact-like benefits, such as duty-free access to parts or vehicles from third countries.

Services: The agreement provides the right of establishment, the right to cross-border sales disciplines on public monopolies and a binding dispute settlement mechanism.

Financial Services: Under the agreement, both nations undertake to eliminate discrimination and improve access and competitive opportunities for financial institutions of the other party consistent with prudential and regulatory requirements.

Investment: Under this agreement, investments will be granted national treatment, with limited grandfathering of existing restrictions by both countries. Under this agreement, Canada commits to make permanent its recent policy of not screening new business investments and it agrees to reduce screening of direct acquisitions significantly.

Intellectual Property: The two sides agreed to resolve longstanding trade irritants in broadcasting (Canada will protect satellite re-transmissions) and to make progress toward establishing adequate and effective protection of pharmaceuticals in Canada by liberalizing compulsory licensing provisions.

Culture: For its part, Canada has agreed that cultural measures it takes will not impair the benefits the U.S. would otherwise expect from the provisions of the agreement. In addition, Canada has agreed to alter a number of practices that discriminate against the U.S., including differential postal rates for U.S. periodicals and elimination of tariffs on printed material and recordings.

Government Procurement: Under the agreement, the U.S. and Canada will eliminate many "buy national" restrictions by lowering from $171,000 to $25,000 the threshold at which open and competitive procedures, as set out by the GATT Government Procurement Code, must be followed.

Personnel Movements: The special trading relationship created by the F.T.A. made it desirable to establish clear procedures to facilitate temporary entry for business travelers. Both countries have agreed to insure easier border crossing for such persons, including both traders and investors.

Elimination of Restrictions: The U.S. and Canada have agreed to remove immediately, or by a timetable, virtually all existing import and export restrictions to trade, and both countries have agreed not to enter into any new import or export restrictions except in accordance with the GATT, or as otherwise permitted in the agreement.

Standards: The agreement allows for standards and regulations, and establishes mechanisms to insure that these measures do not operate to exclude goods of the other party.

Import Safeguards: The agreement establishes special rules that preserve the objectives of the pact without unduly diminishing the rights of U.S. workers and industries to obtain import relief. Section 201 import relief will still be available to industries injured by global imports except that each side will exclude the other from such other global safeguard actions unless its imports are substantial and are found to "contribute importantly" to the injury. However, if excluded initially, a subsequent import surge could lead to inclusion.

Dispute Settlement: The agreement sets up a strong and expeditious dispute settlement mechanism. ?Disputes not resolved in consultations will be automatically referred to arbitration panels, composed of neutral, independent experts in the particular matter under dispute.

Subsidies and Dumping: Both parties have agreed to retain existing national laws and procedures dealing with subsidies and dumping. Both parties agreed, however, that national antidumping and countervailing duty decisions may be appealed to bi-national dispute settlement panels. The dispute settlement procedure will replace review by the courts. The panels will review decisions by U.S. and Canadian authorities to insure that the laws of each country have been faithfully and correctly applied. The panels will apply existing standards of judicial review in the law of the importing country. Accordingly, in the United States, decisions of the Commerce Department and the I.T.C. can be overturned only if they are not supported by substantial evidence or are otherwise not in accordance with U.S. law.

35. Article 102, Chapter One states: The objectives of this Agreement, as elaborated more specifically in its provisions, are to:

a) eliminate barriers to trade in goods and services between the territories of the Parties;

b) facilitates conditions of fair competition within the free-trade area;

c) liberalize significantly conditions for investment within this free-trade area;

d) establish effective procedures for the joint administration of this Agreement and the resolution of disputes; and

e) lay the foundation for the further bilateral and multilateral cooperation to expand and enhance the benefits of this Agreement.

For an assessment of the philosophies and motivations behind each nation's position in the free-trade negotiations, see Murray G. Smith, C. Michael Aho and Gary N. Horlick Bridging the Gap: Trade Laws in the Canadian-U.S. Negotiations (Canada: Canadian-American Committee, 1987).

36. The actual text of the Canada-U.S. Free Trade Agreement was published on October 12, 1987 by The International Trade Communications Group, The Department of External Affairs, 125 Sussex Drive, Ottawa, Ontario K1 A OG2.

37. Timetable from The (Canadian) Financial Post, December 14-20, 1987, p. 6.

38. G. Russell Pipe "Transnational Data Flow: An International Policy Survey" in World Communication Handbook ed. George Gerbner (New York: Longman, 1984), p. 197.

39. Rolf T. Wigand, Carrie Shipley and Dwayne Shipley "Transborder Data Flow, Informatics, and National Policies" Journal of Communication (Winter 1984):153.

40. Paul Anthony Miller "Teleinformatics, Transborder Data Flows and the Emerging Struggle for Information: An Introduction to the Arrival of the New Information Age" Columbia Journal of Law and Social Problems 20(1):108, 1986.

41. G. Russell Pipe "Transnational Data Flow: An International Policy Survey," p. 197.

Pipe outlines the committee's conclusions about Canadian dependence on foreign computing services would:

-reduce Canadian control over disruptions in service resulting from technical breakdowns or work stoppage

-reduce Canadian power to ensure protection against other events, such as invasions of personal privacy and computer crime

-lead to greater dependence on foreign computing staff, which would result in turn in lower requirements for Canadian expertise and a smaller human and technological resource base upon which systems specifically geared to Canadian requirements could be developed.

-jeopardize the exercise of Canadian jurisdiction over companies operating in Canada which store and process their data abroad

-undermine the telecommunications system in Canada by the use of foreign communications satellites and roof-top receiving antennas for the importation of data into Canada

-entail the risk of publication of information that is confidential in Canada

-give access to Videotex services based on foreign databanks emphasizing foreign values, goods, and services

-facilitate the attempts of the government of the United States to make laws applicable outside U.S. territory

Pipe says that because a piecemeal approach to various aspects of the problem might have undesirable side effects on the Canadian economy or result in regulatory "over-kill," the report suggests that "the only solution lies in the cooperative development of a national strategy to protect Canadian interests and derive the greatest benefits from the development and use of informatics technology in Canada."

To this end the committee made two recommendations:

1. The federal government, in concert with the government of the provinces and the private sector, should stimulate forthwith the development of plans for the creation of Canadian-owned private databanks as well as others funded by governments. Tax and other incentives should be devised for that purpose.

2. The government should act immediately to regulate transborder data flows to ensure that we do not lose control of information vital to the maintenance of national sovereignty. Therefore the government should:

-Launch a national awareness campaign to explain the social, economic and cultural implications of the new electronic information society. Without a much wider appreciation of the fundamental nature of the changes now taking place it is unlikely that effective mechanisms for considering the issues will be developed, let alone the implementation of appropriate solutions. It should be the responsibility of the Department of Communications to monitor development in this area.

-Require that data processing related to Canadian business operations be performed in Canada except when otherwise authorized.

-Consider the feasibility of extending the provision in the Bill to revise the Bank Act related to the prohibition of exporting client data for processing and storage abroad. This might be extended, for example, to the insurance and loan industries.

-Provide greater access to risk capital for Canadian corporations in data processing, to prevent foreign take-overs. Use government procurement more effectively in promoting Canadian enterprise in this area.

-Promote more effective education and training for high caliber programmers, systems analysts, and others required for developing Canadian systems. The emphasis should be on application development rather than on machine-oriented research and there should be an effort to exchange personnel between government and industry.

Pipe goes on to point out that many critics of a staunch informatic policy claim that misguided regulation "could prematurely freeze computer technology and increase the cost of doing business in Canada."

42. Miller "Teleinformatics, Transborder Data Flows and the Emerging Struggle for Information," p. 108.

43. G. Russell Pipe "Transborder Data Flow: Main Issues, Trends and Impacts on International Business" in Communication Regulation and International Business (Amsterdam: North-Holland Press, 1984), p. 54.

Pipe also points out that some provinces deny tax deductions to businesses that process their data outside of Canada, thus providing more incentive for domestic data processing.

For more on Canadian TDF regulation, see Hugh P. Donaghue, "Transborder Flow: Its Implications in Canada-United States Relations" in Canada-U.S. Law Journal 2 (1986):290. For more on the impact of TDFs on government policy around the globe, see Dan Schiller's Telematics and Government (Norwood, NJ: Ablex Publishing Corp., 1982).

44. The text of the agreement states in Article 1, Paragraph C. of Annex 1404: "The objective of this Sectoral Annex is to maintain and support the further development of an open and competitive market for the provision of enhanced services and computer services within or into the territories of the Parties."

45. Annex 1404, Chapter C., Article 4, Paragraph 1

46. "Cultural industries" are defined in Article 2012 of the Agreement to include enterprises engaged in: publishing (not including those solely involved in printing or typesetting); the production, distribution, sale or exhibition of film or video recordings; the production, distribution, sale or exhibition of audio or video music recording; the publication, distribution, or sale of music in print or machine-readable form, or; radio communication in which the transmissions are intended for direct reception by the general public, and all radio, television and cable television broadcasting undertakings and all satellite programming and broadcast network services.

47. Mowlana, Global Information and World Communication, p. 103.

48. Jacques Nusbaumer "Some Implications of Becoming a Services Economy" in Communication Regulation and International Business J.F. Rada and G.R. Pipe eds. (Amsterdam: North-Holland, 1984), p. 36.

49. Peter Robinson "Telecommunications, trade and TDF" Telecommunications Policy (December 1985):311. Part of the problem in determining actual trade figures concerning trade in services revolves around the fact that different classifications of trade in services are extremely difficult to establish. The U.S., for example, maintains trade statistics for about 10,000 classes of physical goods, grouped in approximately 3,000 categories. Trade in services, on the other hand, is lumped together under just six categories: travel, passenger fares, other transportation, fees and royalties from foreigners, U.S. government miscellaneous services, and other private services. Most notably, the category "other private services" contains a number of diverse and important services, including non-merchandise insurance, communications, advertising, brokerage, management, certain operational leasing, processing and repair, merchanting, and other professional and technical services. (Sauvant International Transactions in Services, p. 25)

50. From UNCTAD, "Production and Trade in Services, Policies and Their Underlying Factors Bearing upon International Services Transactions", TD/b/941, March 1983, in Sauvant International Transactions in Services, p. 63.

51. Sauvant, International Transactions in Services, p. 63, cites "The Quebec Summit, March 17-18, 1985: Declaration by the Prime Minister of Canada and the President of the United States of America Regarding Trade in Goods and Services," pp. 2-3.

The text of the Canada-U.S. Free-Trade Agreement itself specifically includes "Computer Services" and "Telecommunications-network-based enhanced services" in its list of services covered by the Agreement (Annex 1408). Annex 1404, Article 7 explicitly defines "computer services" as "those services, whether or not conveyed over the basic telecommunications transport network, that involve

generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information in a computerized form, but not limited to computer programming, prepackaged software, computer integrated systems design, computer processing and data preparation, information retrieval services, computer facilities management, computer leasing and rental, computer maintenance and repair, and other computer-related services, including those integral to the provision of other covered services."

52. New York Times, March 16, 1987, I, 1:6.

53. New York Times, April 10, 1986, I, 31:1.

54. "Redrawing the Nation" Maclean's, October 19, 1987, p. 15. See Articles 1701, 1702, 1703, 1704, 1705 and 1706 of the Canada-U.S. Free-Trade Agreement.

55. "Free Trade: A Historic Midnight Deal" Maclean's, October 19, 1987, p. 22. Specifically, see articles 1601, 1602, 1603. 1607. 1610 and 1611, and Annex 1607.3 of the Canada-U.S. Free-Trade Agreement.

56. Sauvant, International Transactions in Services, p. 39. For more on the Canadian perspective, see "Canada-US Trade Relations: An Ontario Perspective" Canadian Parliamentary Review (Winter 1986-87):4-9. Note the reference to "right of establishment" in the excerpts of the free-trade agreement published by the New York Times and the Financial Post, footnote #34.

57. From the point of view of the corporations that deliver services to foreign markets it is a question of business strategy whether to choose trade, FDI or any form in between to serve a foreign market. Sauvant says that it is thus important for corporations that they have the freedom to choose among the various forms of doing business and that they are not constrained by government regulations, especially regulations that would put them in a less advantageous position than domestic corporations (an area of particular concern given Canada's tendency to directly subsidize ailing industries). For service firms, Sauvant says, these options have an even greater importance, "especially in the grey area of market presence and toward the FDI end of the continuum." Sauvant, International Transactions in Services, p. 36

58. New York Times August 6, 1987, IV, 6:4.

59. Steven Globerman and Aidan Vining "Canadian Culture Under Free Trade: Should Canadian-U.S. trade liberalization extend to culture?" Canadian Business Review, Summer 1986, p. 18.

60. New York Times October 5, 1987, IV, 1:4.

61. Jock A. Finlayson "Canadian Business and Free Trade" International Perspectives (March/April 1985):29-31.

62. John M. Curtis "Bilateralism in a Multilateral World" International Perspectives (March/April 1985):25.

63. David H. Pollock and Grant W. Manuge "The Mulroney Doctrine" International Perspectives (Jan./Feb. 1985):5.

64. The New York Times, April 10, 1986, I, 31:1.

65. Frank Stone Canada, the GATT and the International Trade System (Montreal: The Institute for Research in Public Policy, 1984), p. 210.